(3)

Supreme Court, U.S.
FILED
OCT 31 1995
OFFICE OF THE CLERK

No. 95-156

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD LEE MUSCHIK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

4 pp

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-156

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD LEE MUSCHIK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. Respondent contends (Br. in Opp. 2, 6) that the government's petition for a writ of certiorari was untimely because the United States filed a suggestion for rehearing en banc in the court of appeals. That contention is incorrect. The United States filed, in a single document, a petition for rehearing *with* a suggestion for rehearing en banc, and the filing was clearly labeled as both. See Br. in Opp. App. 16a, 18a. That filing was effective as both a petition for rehearing under Rule 40 of the Federal Rules of Appellate Procedure—which tolls the time for filing a petition for a writ of certiorari until the petition for rehearing is denied or a subsequent judgment is entered (see Sup. Ct. R. 13.3; *Missouri* v. *Jenkins*, 495 U.S. 33, 45-46 (1990))—and a suggestion for rehearing

en banc under Rule 35 of the Federal Rules of Appellate Procedure.

Nothing in the Federal Rules of Appellate Procedure or the Ninth Circuit Rules precludes the filing of a petition for rehearing with a suggestion for rehearing en banc in one document, and this Court has noted that parties frequently combine the two pleadings in one document. *Missouri* v. *Jenkins*, 495 U.S. at 47 n.16. The Ninth Circuit Rules anticipate that the two pleadings will be combined in one filing; Rule 35-1 states that, "[w]here a suggestion of the appropriateness of a rehearing en banc is made pursuant to FRAP 35(b) *as a part of a petition for rehearing*, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the *combined* petition and suggestion." 9th Cir. R. 35-1 (emphasis added). The advisory committee notes to Ninth Circuit Rule 40-1 differentiate, for the purpose of prescribing the number of copies to be filed, the situation "[w]here a petition for a rehearing does not include a suggestion for a rehearing en banc" from the situation "[w]here a petition for rehearing does include a suggestion for a rehearing en banc."

The Ninth Circuit also treated the government's papers in this case as both a petition for rehearing and a suggestion for rehearing en banc. The court of appeals' last order in the case states that "*[t]he panel*, as constituted in the above case, has voted to deny [the government's] petition for rehearing." Pet. App. 26a (emphasis added). The court therefore recognized that the government had filed a petition for panel rehearing under Rule 40. The court's order further states: "The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED." Pet. App. 27a. Thus, "the Court of

Appeals interpreted and actually treated the [government's] papers as including a petition for rehearing before the panel." *Missouri* v. *Jenkins*, 495 U.S. at 47. The 90-day period for filing a petition for a writ of certiorari runs from the date that the court denied the petition for rehearing, Sup. Ct. R. 13.3, and the petition for a writ of certiorari was filed within that period.

2. Respondent also suggests (Br. in Opp. 7) that this case should be argued in tandem with *Neal* v. *United States*, cert. granted, 115 S. Ct. 2576 (1995) (to be argued December 4, 1995), which presents the same issue. The issues have been fully briefed in *Neal*, in which (contrary to respondent's contention, Br. in Opp. 7), petitioner Neal is represented by counsel. Moreover, the fact that Neal received some benefit from the new LSD Guideline is not central to the government's argument in that case (*ibid.*). For this case, therefore, it is sufficient that the Court hold the petition pending the decision in *Neal* and then dispose of the petition as appropriate in light of that decision.

* * * * *

For the foregoing reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be held pending the decision in *Neal* v. *United States*, cert. granted, 115 S. Ct. 2576 (1995) and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1995